70 Ala. 389. Such defendant may include in the set-off whatever the plaintiff could have earned if he had made an honest effort to find other work, it being against the policy of the law to encourage idleness. *Howard* v. *Daly*, 61 N. Y. 362. He may sue at once for the breach of contract. *G. A. Kelly Plow Co.* v. *London* (Tex.), 125 S. W. 974. If the plaintiff adopts the third course, it is settled that he may recover the damages which have accrued from the breach up to the date of the trial. *Blair* v. *Laflin*, 127 Mass. 178; *Davis* v. *Dodge*, 126 App. Div. 469, 110 N. Y. Supp. 787. But as to whether or not he can recover damages for the loss of the future benefit which would have accrued to him under the contract there is some conflict. It has been held that when a servant, who has been wrongfully discharged brings his action before the expiration of the contract period he can only recover damages which have accrued at the time of the trial. *Gordon* v. *Brewster*, 7 Wis. 355; *Fowler* v. *Armour, supra.* The courts which hold this view usually assign as a reason that future damages cannot be assessed with sufficient certainty to justify their award. The weight of authority, however, seems to support the doctrine that when the wrongfully discharged servant brings his action before the end of the term he can recover full damages for the breach of contract as well as wages already accrued. *Cutter* v. *Gillette*, 163 Mass. 95, 39 N. E. 1010; *Inland Steel Co.* v. *Harris*, 49 Ind. App. 157, 95 N. E. 271; *Webb* v. *Depew*, 152 Mich. 698, 116 N. W. 560; *Davis* v. *Dodge, supra.* A number of cases are cited as holding that only accrued damages can be recovered which do not in fact so hold. Among the authorities cited in the principal case as supporting this doctrine, one at least, seems to hold *contra*. *Hassel* v. *Nutt*, 14 Tex. 260. And in others, although the courts held that no damages could be recovered except those already accrued, the decisions were based on lack of evidence or other grounds than that principle which they were cited to support. *Meade* v. *Rutledge*, 11 Tex. 44; *Waco Tap. R. R. Co.* v. *Shirley*, 45 Tex. 355; *Hearne* v. *Garnett*, 49 Tex. 626.

It seems that the weight of authority as well as the better principle supports the doctrine that future damages for the breach are recoverable, although there may be difficulty in assessing the damages and although they be uncertain, yet there is certainly some damage suffered which ought to be recompensed by the wrongdoer, and the uncertainty is no greater than in the case of death by wrongful act, which gives the courts no trouble. *Cutter* v. *Gillette, supra.*

MASTER AND SERVANT—NEGLIGENCE—CUSTOMARY METHODS—UNBLOCKED FROGS.—In an action against a railroad company for the death of a brakeman by catching his foot in the unblocked space between the guard and main rail, qualified railroad men differed in their testimony as to whether it was safer to block such space or not, railroad companies in general being divided as to which method to use. *Held*, it cannot be said as a matter of law that the defendant was not negligent, but it is a question for the jury's consideration. *Korab* v. *Chicago, etc., Ry. Co.* (Iowa), 143 N. W. 876.

Railroad companies are required to construct their roadways and ap-

purtenances in such manner as will enable their employees to perform the labor required of them with reasonable safety, but they are not required to adopt every new invention or even every appliance which the majority of well regulated railroads have adopted. *Wash. & G. Railroad Co.* v. *McDade,* 135 U. S. 554; *Louisville R. Co.* v. *Hall,* 91 Ala. 112, 24 Am. St. Rep. 863; *L. S. & M. S. R. W. Co.* v. *McCormick,* 74 Ind. 440; *Louisville R. Co.* v. *Sanford,* 117 Ind. 265, 19 N. E. 770.

By the weight of authority, conformity by railroad companies to general usage in constructing and equipping their roads is merely evidence tending to show ordinary care on their part and is not conclusive of absence of negligence under the particular circumstances. While the custom itself may be negligent, the ordinary usage is the test to be applied. *Martin* v. *Cal. Cent. Ry. Co.,* 94 Cal. 326, 29 Pac. 645; *Kirby* v. *Chicago, etc., Ry. Co.,* 150 Ia. 587, 129 N. W. 963; *Reese* v. *Hershey,* 163 Pa. St. 253, 29 Atl. 908, 43 Am. St. Rep. 795. *Contra, Titus* v. *Bradford, B. & K. R. Co.,* 136 Pa. St. 618, 20 Atl. 517. Where there are several sorts of equipment in general use, the railroad company is free to select which form it will adopt and cannot be held responsible in damages to an employee injured while using the apparatus selected, on the ground that some other style might, under the circumstances, have been safer. *O'Neill* v. *C. R. I. & P. Ry. Co.,* 66 Neb. 638, 92 N. W. 731, 60 L. R. A. 443; *Kehler* v. *Schwenk,* 144 Pa. St. 348, 22 Atl. 910, 13 L. R. A. 374.

The courts are in conflict as to whether engineering questions pertaining to the permanent structure of railroad companies should be submitted to the jury. Probably the majority of courts favor the view that engineering matters are not for a jury's consideration. *Tuttle* v. *Detroit, G. H. & M. Ry.,* 122 U. S. 189; *B. & O. S. W. R. Co.* v. *McOsker,* 172 Ind. 720, 88 N. E. 950; *Pauza* v. *Lehigh Valley Coal Co.,* 231 Pa. St. 577, 80 Atl. 1126. *Contra, Gorden* v. *C. R. I. & P. Ry. Co.,* 129 Ia. 747, 106 N. W. 177.

If it is purely an engineering question for the railroad company to select the form it deems the safest the rule favored by the federal courts that the use of the unblocked frog under the circumstances given in the principal case is not negligence, and the jury should be so instructed, appears to be the sounder view. *Southern Pacific Co.* v. *Seley,* 152 U. S. 145; *Kilpatrick* v. *Choctaw, O. & G. R. Co.,* 195 U. S. 624; *McGinnis* v. *Canada Southern Bridge Co.,* 49 Mich. 466, 13 N. W. 819; *O'Neill* v. *C. R. I. & P. Ry. Co., supra.* The principal case, however, is upheld by several state decisions. *Hamilton* v. *Rich Hill Coal Min. Co.,* 108 Mo. 364, 18 S. W. 977; *Meek* v. *N. Y. Cent. & H. R. R. Co.,* 140 N. Y. 622, 35 N. E. 891.

It is interesting to note that all the cases in which the question has arisen involve the use of the unblocked frog, one railroad company which uses this form having been particularly susceptible to such suits. If this is not a mere coincidence but may be considered as evidence that the blocked frog is the safer, then it lends weight to the justness of the decision in the principal case, and also to the soundness of the doctrine that the use of blocked or unblocked frogs is not solely an engineering question.